

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.1244 of 2016**

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The Chairman, I C I C I Lombard General Insurance Company Limited,  
Interface Building no. 11, 201/202, 4<sup>th</sup> Floor, New Link Road, Malad (w),  
Mumbai (Maharashtra) 700064, Appeal and Appellant through the Manager  
Legal & authorized signatory, ICICI Lombard General Insurance Company  
Limited, Uima Complex, Frazer Road, Patna.

... .. O.P. No.2/Appellant

Versus

1. Ranju Devi, w/o Late Ramesh Kumar @ Ramesh Kumar Swarnkar
2. Shambhu s/o Late Ramesh Kumar @ Ramesh Kumar Swarnkar
3. Dipa Kumari d/o Late Ramesh Kumar @ Ramesh Kumar Swarnkar  
(Res. 2 & 3 are minor and are under the guardianship of mother, Res.1)  
All the above are Resident of Krishna Nagar, Saharsa, P.S.- Saharsa,  
District- Saharsa, at present residing at Mohalla- Suleman, Madhepura, P.S.-  
Madhepura, District- Madhepura, Bihar.

... .. Claimants/Respondents

4. Suraj Kumar s/o Bhageshwar Jha Resident of Village/P.O.- Bhaun, P.S.  
+district - Madhepura, Bihar. (Owner).

... .. O.P.-1/Respondent

5. Shyam Kishor Yadav s/o Khatar Yadav Resident of Village- Bhan Tekri,  
P.S./District Madhepura, Driver.

... .. O.P.-3/Respondent

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**Appearance :**

For the Appellant/s : Mr.Durgesh Kumar Singh, Advocate  
For the Respondent/s : Mr.Amandeep Kumar, Advocate

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**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD**  
**ORAL JUDGMENT**

**Date : 07-02-2023**

Heard learned counsel for the parties.

2. This miscellaneous appeal arises out of the judgment dated 03.08.2016 passed by the learned 3rd Additional District and Sessions Judge-cum-Motor Vehicle Accident Claim Tribunal, Madhepura (hereinafter referred to as the 'Tribunal') in MACT Case No. 31 of 2011 whereby and whereunder learned tribunal has been pleased to direct the insurance company (the appellant) to



pay a compensation of Rs. 19,97,480/- with interest thereon @ 9% per annum from the date of filing of the application to the claimants-respondent no. 1 to 3.

**Brief facts and submissions on behalf of the appellant.**

3. Mr. Durgesh Kumar Singh, learned counsel for the appellant has assailed the impugned judgment on various grounds. His first submission is that the learned tribunal has assessed a monthly income of Rs. 8190/- of the deceased by taking his daily earning at the rate of Rs. 273/-. Learned counsel submits that it is a case in which the deceased Ramesh Kumar @ Ramesh Kumar Swarnkar while driving a two wheeler was dashed by a tempo on 20.02.2011. He died in the said accident. At the time of his death he was aged about 33 years and the claimants who are the wife and minor children of the deceased claimed that the deceased was working as a skilled workman in a Jewellery Shop namely 'Anil Jewellers' and he was earning a sum of Rs.300-350/- per day. His submission is that to substantiate their claim as to his daily income, the claimants did not bring credible evidence and it would appear that apart from the family members and close relative of the deceased no independent witness came in support of the case of the claimants on the point of income. It is stated that the



Jewellery Shop was owned by the co-brother of the deceased and he deposed that the deceased was earning a sum of Rs. 300-350/- per day.

4. Learned counsel further submits that the tribunal could not appreciate that during the contemporary period in the year 2011 the notified rate of the minimum wages of skilled worker was only Rs. 151/-, therefore, even for the case shake if it is assumed that the deceased was a skilled worker, the tribunal had no reason to fix the monthly income of the deceased taking his daily earning at Rs. 273/-. Learned counsel, therefore, submits that the compensation is excessive on this account.

5. It is further submitted that in this case it has come in evidence that the deceased was having a learners license, which had already expired. He was driving the vehicle in question without a valid driving license, therefore, on this ground alone the appellant can avoid its liability to pay the claim.

6. Learned counsel further submits that the tempo was not having a permit to ply the vehicle on the given route. Therefore, in absence of permit if the tempo was plying and in course of that due to rash and negligent driving of the vehicle the accident took place which ultimately proved fatal for the life of the deceased, the owner of the offending tempo bearing Registration



No. BR-43B-4793 would be liable to pay the compensation. It is submitted that in any case if the tribunal had directed the insurance company to pay the claim amount despite no proof of their being a permit of the tempo, in view of the judgment in the case of **National Insurance Co. Ltd. Vs. Challa Upendra Rao and Ors.** reported in **(2004) 8 SCC 517**, the tribunal should have directed the owner to provide adequate security to the insurance company for the award amount before release of the said amount by the insurance company.

7. Learned counsel further submits that the tribunal has allowed future prospect @ 50% which is not in accordance with the Constitution Bench judgment of the Hon'ble Supreme Court in the case of *National Insurance Company Limited vs. Pranay Sethi and others* reported in **(2017)16 SCC 680**.

8. His further submission is that tribunal had allowed excessive and higher sum of money on account of loss of love and affection and guardianship of minor applicants, loss of consortium, loss of estate and funeral expenses. It is his submission that on all these counts the compensation allowed by the tribunal is liable to be interfere with.



**Submission on behalf of the claimants.**

9. Mr. Amandeep Kumar, learned counsel for respondent nos. 1 to 3 has opposed this appeal. Relying upon the judgments of the Hon'ble Supreme Court in the case of *Shankarayya and Anr vs. United India Insurance Company Ltd.* reported in **JT 1998 (4) SC 300 = AIR 1998 SC 2968**, learned counsel submits that the insurance company cannot maintain this appeal as there is no order of the learned tribunal allowing the insurance company to avail the larger defence. It is submitted that the insurance company had not obtained any order as required under Section 170 of the Motor Vehicle Act, 1988 (hereinafter referred to as the 'Act of 1988'). Learned counsel has, in order to strengthen his submission relied upon the judgment of the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd., Chandigarh vs. Nicolleta Rohtagi and Ors.* Reported in **2002 7 SCC 456**; *United India Insurance Co. Ltd. vs. Shila Datta and Ors.* reported in **2011 (7) SCC 129** and has further placed reliance upon the judgment of the learned Co-ordinate Bench of this Court in M.A. No. 493 of 2004 (**Oriental Insurance Company Ltd. Vs. Vidya Nand Yadav and Ors.**).

10. Learned counsel has submitted that even though **Shila Datta** has doubted the **Nicolleta Rohtagi** (Supra) referring a



passage from the *British India General Insurance Co. Ltd. vs. Captain Itwar Singh and Ors.* reported in AIR 1959 SC 1331. The fact remains that Nicolleta Rohtagi (Supra) has been followed by the Hon'ble Supreme Court in a later judgment in the case of **Josphine James vs. United India Insurance Co. Ltd. and Anr.** reported in **2013 (4) TAC 22(SC)**. It is his submission that the insurance company (the appellant) cannot be allowed to avail the defence of the insured who has not preferred any appeal. Thus, the appellant cannot be permitted to contest the case on merits. In his submission the only limited defence available to the insurance company/appellant is to contest the case in terms and the defences provided under Section 149(2) of the Act of 1988.

**11.** Learned counsel further submits that as regards the driving licence of the deceased, the insurance company has not been able to prove on this ground alone that there was any negligence on the part of the deceased in driving the vehicle. It is his submission that to bring home a plea of contributory negligence the insurance company was required to prove it by bringing sufficient evidences on the record.

**12.** Attention of this Court has been drawn towards the observations of the learned tribunal in paragraph '12' of the impugned judgment wherein the learned tribunal has decided issue



no. 4 as to whether the opposite party no. 1 deserves to be indemnified by the opposite party no.2 as per policy of insurance. The tribunal has recorded that the claimants had produced 4 witnesses in support of their claim and all of them have supported the fact that on 20.02.2011, the accident took place near the Dharmkata Chakla Chowk and they have further stated that the tempo had dashed the deceased. It is not in dispute that at the relevant time the tempo was insured by the insurance company. So far as the insurance company is concerned, no oral or documentary evidence were led on behalf of the insurance company to prove that it was a case of contributory negligence.

**13.** Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Mangla Ram and Others versus Oriental India Co. Ltd. and Ors. [Civil Appeal nos. 2499-2500 of 2018 (arising out of slp (civil) nos 28141-42 of 2017]** to submit that in absence of there being any evidence to show that the vehicle was being driven negligently by the deceased at the time of accident, the same cannot be assumed. The Hon'ble Supreme Court held that the argument of the respondents that the appellant did not possess valid driving licence at the time of accident will be of no significance. Learned counsel submits that to succeed on this ground, the Insurance Company was obliged to



bring legal evidence to answer the issue of contributory negligence against the deceased.

**On the point of income**

14. Learned counsel submits that in such cases where the deceased was a daily wage earner, no documentary evidences could have been produced. It is submitted that in this case the shop owner had himself deposed. One independent witness Rajesh Kumar Singh had also deposed and so far as the occupation of the deceased is concerned, no doubt was raised as regards the occupation, therefore, the tribunal should have accepted the income of the deceased at Rs.350/- per day, instead the Tribunal has allowed only Rs.273/- per day. In his submission this finding of the Tribunal is required to be interfered with and the income of the deceased be taken at Rs.350/- per day. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Chameli Devi and Others versus Jivrail Mian and Others** reported in **2019 (4) T.A.C. 724 SC**, to submit that in said case the deceased was a carpenter and in an accident which took place in the year 2001, the Tribunal assessed his income at Rs.1250/- per month which was enhanced by the High Court at Rs.3,000/- per month but the Hon'ble Supreme Court held that it would not be unjustified to assess his income at Rs.200/- per day. It is, thus, his



submission that in the present case of the year 2011, the Tribunal would have been justified in assessing the income of the deceased at Rs.350/- per day.

**15.** As regards the offending vehicle not having a permit, learned counsel has further relied upon a judgment of the Hon'ble Supreme Court in the case of *National Insurance Co. Ltd. versus Challa Upendra Rao and Ors.* reported in (2004) 8 SCC 517 to submit that in the said case even as the Hon'ble Supreme Court held that the vehicle was plying without a permit and in such circumstance, the owner would be liable to pay the claim and the insurer cannot be held liable, the Hon'ble Supreme Court directed the insurer to satisfy the award, though in law it has no liability and held that in some cases, the insurer has been given option and liberty to recover the amount from the insured. In the said case, the Hon'ble Supreme Court directed the owner of the offending vehicle to furnish security for the entire amount which the insurer will pay to the claimants, before release of the amount to the claimants.

### **Consideration**

**16.** Having heard learned counsel for the parties and upon perusal of the records, this Court finds that so far as the maintainability of the present appeal is concerned, the plea of



learned counsel for the claimants-respondent nos. 1 to 3 that in absence of there being an order under Section 170 of the Act of 1988, the appellant cannot be permitted to challenge the impugned judgment and award on merit by taking a larger defence is liable to succeed.

17. Since the present case requires a brief discussion on the scope and ambit of Sections 149 and 170 of the Act of 1988 (prior to its amendment) with a reference to various judicial pronouncements on this subject, this Court deems it just and proper to extract Sections 149 and 170 of the Act of 1988 as under:-

**“149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—**

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.



(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions



of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.



(6) In this section the expressions “material fact” and “material particular” means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so at what premium and on what conditions and the expression “liability covered by the terms of the policy” means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation.—For the purpose of this section, “Claims Tribunal” means a Claims Tribunal constituted under section 165 and “award” means an award made by that Tribunal under section 168.

**170. Impleading insurer in certain cases.**—Where in the course of any inquiry, the Claims Tribunal is satisfied that —

- (a) there is collusion between the person making the claim and the person against whom the claim is made, or
- (b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. ”



**18.** This issue is no longer a *res-integra*. In case of **Shankarayya** (supra), the Hon'ble Supreme Court has taken note of Section 170 of the Act of 1988 and thereafter proceeded to observe in paragraphs '4' and '5' as under:-

“4. It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined Respondent 1, Insurance Company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, Respondent 1, Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal.

5. It was not disputed before us that Respondent 1, Insurance Company on account of the contract of insurance is liable to comply with the entire award amount of compensation. That precisely is the reason why the insured has not thought it fit to challenge the compensation in these proceedings. Under these circumstances, Respondent 1, Insurance Company will have to satisfy the entire award amount as directed by the Tribunal. If any part of the said amount remains still unpaid, the said balance amount shall be deposited by Respondent 1 in the



Tribunal within eight weeks from the receipt of the copy of this order at its end. Office shall send a copy of this order to first respondent, Insurance Company.”

**19.** In the case of **Nicolletta Rohtagi** (Supra), a Three-Judges’ Bench of the Hon’ble Supreme Court traced the legislative history of the English Law as regards liability of an insurer in the event of a motor accident. For brevity shake, this Court is not reproducing those paragraphs but the resultant discussions may be found in paragraphs ‘12’ to ‘16’ which are quoted hereinbelow for a ready reference:-

“**12.** We have traced the legislative history of English law as regards liability of an insurer in the event of a motor accident in respect of third-party right not for interpreting Sections 149, 170 and 173 of the 1988 Act, but only for showing that while enacting Chapter VIII of the 1939 Act or Chapter XI of the 1988 Act, the intention of the legislature was to protect third-party rights and not the insurer.

**13.** To answer the question, it is necessary to find out on what grounds the insurer is entitled to defend/contest against a claim by an injured or dependants of the victims of a motor vehicle accident. Under Section 96(2) of the 1939 Act which corresponds to Section 149(2) of the 1988 Act, an insurance company has no right to be a party to an action by the injured person or dependants of the deceased against the insured. However, the said provision gives the insurer the right to be made a party to the case and to defend it. It is, therefore, obvious that the said right is a creature of the statute and its content depends on the provisions of the statute. After the insurer has been made a party to a case or claim, the question arises, what are the defences available to it under the statute?



The language employed in enacting sub-section (2) of Section 149 appears to be plain and simple and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of the 1988 Act, and no other ground is available to him. The insurer is not allowed to contest the claim of the injured or heirs of the deceased on other ground which is available to an insured or breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of the 1988 Act. If an insurer is permitted to contest the claim on other grounds it would mean adding more grounds of contest to the insurer than what the statute has specifically provided for.

**14.** Sub-section (7) of Section 149 of the 1988 Act clearly indicates in what manner sub-section (2) of Section 149 has to be interpreted. Sub-section (7) of Section 149 provides that no insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. The expression “manner” employed in sub-section (7) of Section 149 is very relevant which means an insurer can avoid its liability only in accordance with what has been provided for in sub-section (2) of Section 149. It, therefore, shows that the insurer can avoid its liability only on the statutory defences expressly provided in sub-section (2) of Section 149 of the 1988 Act. We are, therefore, of the view that an insurer cannot avoid its liability on any other grounds except those mentioned in sub-section (2) of Section 149 of the 1988 Act.



**15.** It is relevant to note that Parliament, while enacting sub-section (2) of Section 149 only specified some of the defences which are based on conditions of the policy and, therefore, any other breach of conditions of the policy by the insured which does not find place in sub-section (2) of Section 149 cannot be taken as a defence by the insurer. If Parliament had intended to include the breach of other conditions of the policy as a defence, it could have easily provided any breach of conditions of insurance policy in sub-section (2) of Section 149. If we permit the insurer to take any other defence other than those specified in sub-section (2) of Section 149, it would mean we are adding more defences to the insurer in the statute which is neither found in the Act nor was intended to be included.

**16.** For the aforesaid reasons, we are of the view that the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section 149 of the 1988 Act and not more and for that reason if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds.”

**20.** In the case of **Shila Datta** (supra) a Bench of equal strength raised a doubt and took a view that **Nicolletta Rohtagi** (Supra) requires reconsideration by larger Bench on issue nos. (iii) to (v). The submissions advanced on behalf of the Insurer were taken note of as issues which required consideration. Issue Nos. (iii) to (v) framed in the case of **Nicolletta Rohtagi** (Supra) were as under:-

“(iii) When an insurer is aggrieved by the quantum of compensation, it is not seeking to *avoid or exclude* its liability, but merely wants determination of the extent of its liability. The restrictions imposed upon the insurers to defend the action by the claimant or file an appeal against



the judgment and award of the Tribunal will apply, only if it wants to file an appeal to avoid liability and not when it admits its liability to pay the amount awarded, but only seeks proper determination of the quantum of compensation to be paid.

(iv) Appeal is a continuation of the original claim proceedings. Section 170 provides that if the person against whom the claim is made, fails to contest the claim, the insurer may be permitted to resist the claim on merits. If and when an award is made by the Tribunal, which is excessive, arbitrary or erroneous, the owner of the vehicle has to challenge the same by filing an appeal before the High Court. If the insured (owner of the vehicle) fails to challenge an award even when it is erroneous or arbitrary or fanciful, it can be considered that the insured has failed to contest the same and consequently under Section 170, the High Court or the Tribunal may permit the insurer to file an appeal and contest the award on merits.

(v) The Motor Vehicles Act, 1988 ("the Act", for short) creates a liability upon the insurer to satisfy the judgments and awards against the insured. The Act expressly restricts the right of the insurer to avoid the liability as insurer, only to the grounds specified in Section 149(2) of the Act. Though it is impermissible to add to the grounds mentioned in the statute, the insurer has a right, if it has reserved such a right in the policy, to defend the action in the name of the insured. If it opts to step into the shoes of the insured, it can defend the action in the name of the insured and all defences open to the insured will be available to it and can be urged by it. Its position contesting a claim under Section 149(2) of the Act is distinct and different, when it is contesting the claim in the name of or on behalf of the insured owner of the vehicle. In cases, where it is authorised by the policy to defend any claim in the name of the insured, and the insurer does so, it cannot be restricted to the grounds mentioned in



Section 149(2) of the Act, as the defence is on behalf of the owner of the vehicle.”

**21.** The Hon’ble Supreme Court referred a passage from the judgment in the case of **British India General Insurance** (Supra) and made an observation which may be found in paragraph ‘20’ of the judgment which are being reproduced hereinbelow:-

“20. ...The Statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do....” (emphasis supplied)

Nicolletta Rohtagi did not consider the issue with reference to the situation where the insurer is enabled by a specific term in the insurance policy to take over and conduct the defence of the case in the name of the insured, presumably as the insurance policy did not have such an enabling provision. In fact if such a contention had been raised, the court would have noticed that the issue was covered by a binding three-Judge Bench judgment in **British India General Insurance**. Be that as it may. ”

**22.** After **Shila Datta** was referred to a larger Bench, the Hon’ble Supreme Court had occasion to consider the same issue in the case of **Josphine James**. In the said case the High Court had reduced the quantum of compensation under the heading of loss of dependency of the appellant at the instance of the Insurance



Company even as the Insurance Company had not obtained any permission from the Tribunal under Section 170(b) of the Act of 1988. In paragraph '17' of the judgment in case of **Josphine James**, the Hon'ble Supreme Court observed as under:-

“ 17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (supra) and earlier decisions wherein this Court after interpreting Section 170(b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to supra though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court. ”

**23.** A similar question fell for consideration before a learned Co-ordinate Bench of this Court in M.A. No. 493 of 2004 (Oriental India Co. Ltd. vs. Vidya Nand Yadav and Ors.). In the said case, the Insurance Company argued that under Section 173 of the Act of 1988 any person aggrieved from the award of the tribunal is entitled to file an appeal against the award and that the appellant being aggrieved from the award has every right and competence to



file an appeal. The learned Co-ordinate Bench, however, relied upon the judgment of the Hon'ble Supreme Court in the case of **Sadhana Lodh versus National Insurance Co. Ltd. and Another** reported in **(2003) 3 SCC 524** in which the Hon'ble Apex Court has held that an insurer has right to file an appeal before the High Court on limited grounds available under Section 149(2) of the Act and that the appeal being a product of the Statute is not open to an insurer to make any plea other than those provided under Section 149(2). In case where there is a collusion between the claimant and the insurer or the insured does not contest the claim and further if the Tribunal does not implead the Insurance Company to contest the claim, in such a situation it is open to the insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. The learned Co-ordinate Bench, therefore, held that the appeal filed by the Insurance Company under Section 173 of the Act of 1988 was not maintainable.

**24.** In the present case, the admitted position is that the insurance company (the appellant) has not obtained an order under Section 170(a) or (b) of the Act of 1988, therefore, this Court has no iota of doubt that in view of the express provision of Section 170, without satisfying those conditions and without obtaining an order from the Tribunal the insurance company cannot be



permitted to maintain this appeal on merit. This Court would, therefore, not permit the insurance company (the appellant) to challenge the impugned judgment and award by raising larger defence.

**25.** So far as the plea raised on account of the deceased not having a driving license is concerned, this Court finds that a plea to this effect alone without proving that it is a case of contributory negligence on the part of the deceased by bringing sufficient evidence on the record, would not succeed. In this regard, the judgment of the Hon'ble Supreme Court in the case of **Mangla Ram** (supra), paragraph '24' thereof is being reproduced hereunder:

“**24.** In other words, we are inclined to hold that there is no title of evidence about the motorcycle being driven negligently by the appellant at the time of accident. The respondents did not produce any such evidence. That fact, therefore, cannot be assumed. Resultantly, the argument of the respondents that the appellant did not possess a valid motorcycle driving licence at the time of accident, will be of no significance. Thus, we hold that there is no legal evidence to answer the issue of contributory negligence against the appellant.”

**26.** The another submission of learned counsel for the appellant that the offending vehicle was plying without a permit, therefore, the insurance company has a defence available under Section 149(2) of the Act of 1988 could have succeeded only and only if the insurance company would have brought any evidence to



bring home its plea. Unfortunately, the insurance company has not led any evidence on this issue. In paragraph '8' of the impugned judgment the learned Tribunal has categorically recorded that opposite party nos. 1, 2 and 3 have not brought any oral or documentary evidence. If this is the position which is not disputed before this Court, this Court is bound to hold that the plea that the vehicle was plying without having a permit cannot succeed.

**27.** At this stage, this Court would briefly deal with the evidences available on the record as regards the income of the deceased. Four witnesses have been examined on this issue. The occupation of the deceased is not in doubt and in fact in the light of the views already expressed by this Court hereinabove, the insurance company cannot be allowed to challenge the judgment of the Tribunal on this count by taking a larger defence. On the point of income also, this Court finds that as against the then prevailing minimum wages of Rs. 151/- for the skilled worker, in the nature of the occupation being performed by the deceased if the Tribunal has assessed the income of the deceased at Rs. 273/- per day, no fault may be found with the same. Although, learned counsel for the claimants – O.P. Nos. 1, 2 and 3 has submitted that the Tribunal is not justified in allowing only Rs. 273/- per day instead of Rs. 350/- as was being claimed by the claimants, this



Court is of the considered opinion that the Tribunal has taken a reasonable view of the matter on this issue and no interference is required by this Court on the point of income.

**28.** This Court, however, finds that contrary to the judgment of the Hon'ble Apex Court in the case of **Pranay Sethi** the Tribunal has allowed future prospect @ 50%. Since in the case of **Pranay Sethi** the Hon'ble Supreme Court has laid down the law and the deceased in this case is less than 40 years old, in his case 40% of the actual income shall be added as future prospect. Similarly, on account of loss of love and affection the Tribunal has allowed Rs. 2,00,000/- to the two minor children which in terms of the judgment of the Hon'ble Apex Court in the case of **Pranay Sethi** (supra) will be allowed under head 'parental consortium' at the rate of Rs. 40,000/- plus increase @ 10%. It will, therefore come down to Rs. 44,000/- each to the two minor children as 'parental consortium'. The claimant no. 1 (wife) has been allowed loss of consortium at Rs. 1,00,000/- which will come down to Rs. 44,000/- and loss of estate at Rs. 15,000/-. The funeral expense which has been allowed at Rs. 25,000/- will come down to Rs. 15,000/-.

**29.** In the light of the aforesaid discussions, this Court is of the considered opinion that on merit no interference is required



with the findings of the impugned judgment, however, the quantum of compensation is to be rearranged in terms of the judgment of the Hon’ble Apex Court in the case of **Pranay Sethi** (supra) as indicated by this Court hereinabove.

**30.** The calculation in terms of **Pranay Sethi** would be as under:

|        |                                                                                                      |                  |
|--------|------------------------------------------------------------------------------------------------------|------------------|
| (i)    | Monthly Income                                                                                       | Rs.8,190.00      |
| (ii)   | Add Future Prospect @ 40%                                                                            | Rs.3,276.00      |
|        | Total                                                                                                | Rs.11,466.00     |
| (iii)  | Less Personal Expenses 1/4th of Rs.11466.00                                                          | Rs.2,866.00      |
| (iv)   | Loss of Dependancy: Rs. 8,600 x 12 x17                                                               | Rs.17,54,400.00  |
| (v)    | Funeral Expenses                                                                                     | Rs.15,000.00     |
| (vi)   | Loss of Estate                                                                                       | Rs.15,000.00     |
| (vii)  | Loss of Spousal Consortium                                                                           | Rs.44,000.00     |
| (viii) | Loss of Parental Consortium to both of the minor children at the rate of 44,000.00 each              | Rs.88,000.00     |
|        | Total compensation to be paid                                                                        | Rs. 19,16,400.00 |
|        | Less amount already paid                                                                             | If Any           |
|        | Award/Balance payable with interest @ 9% per annum from the date of filing of the claim till payment |                  |

**31.** The impugned judgment and award are accordingly modified. The Insurance Company shall pay the awarded amount after deducting the payments if any already made to the claimants under the award within a period of thirty (30) days from the date of receipt/communication of this order.

**32.** Learned counsel for the Insurance Company has prayed for returning the statutory amount deposited by the



appellant at the time of filing of the appeal. Learned counsel submits that in view of the judgment of this court in the case of **United India Insurance Insurance Company Limited Vs. Manju Devi and others** reported in **(1998) 3 PLJR 506** the amount so deposited is to be adjusted against the award. Since the Insurance Company has been made liable to pay the award amount, the statutory amount be refunded. Let the statutory amount be returned to the Insurance Company.

**33.** The Miscellaneous Application is disposed of.

**(Rajeev Ranjan Prasad, J)**

Rajeev/Rajnish-

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